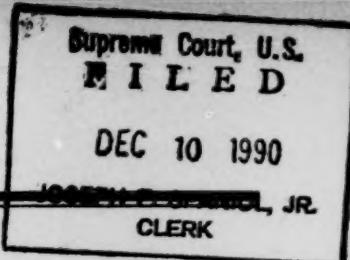


No. 90-734



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PETER PAUL MITRANO,
Petitioner,
v.

KARIN C. RUBLE,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether sustaining of Demurrer by lower State Court and denial of appeal by Supreme Court of Virginia violated Petitioner's Seventh Amendment right to trial by jury.



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JURISDICTIONAL STATEMENT

Title 28, Section 1257, of the United States Code, defines the jurisdiction of Supreme Court on a Writ of Certiorari as follows:

“(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to

the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Petitioner contends solely that jurisdiction lies with this Court due to a violation of his "right" to trial by jury under the Seventh Amendment to the Federal Constitution.

This Court has long held that the right to trial by jury found in the Seventh Amendment to the Federal Constitution applies only to federal courts. *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 33 S.Ct. 523, 528 (1913). "There is nothing, however, in the Constitution of the United States or its amendments that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether." *Chicago R.I. & P.R. Co. v. Cole*, 251 U.S. 54, 40 S.Ct. 68, 69 (1919) (citations omitted).

Petitioner's action for malicious prosecution was brought in the Virginia State Court. Virginia is free to alter the role of the jury or do away with it altogether. Petitioner has no right to trial by jury under the Federal Constitution. Any such right must be derived from the state laws or State Constitution. A violation of this right from the state without more is not reviewable by this Court on writ of certiorari. Therefore, Petitioner fails to set forth any basis for jurisdiction by this Court.

ARGUMENT

If this Court finds that jurisdiction is proper, the sustaining of the Demurrer by the lower State Court and denial of appeal by Supreme Court of Virginia did not violate Petitioner's right to trial by jury. "The aim of the amendment, as this Court has held, is . . . to retain the common-law distinction between the province of the Court and that of the jury, whereby . . . issues of law are to be resolved by the Court and issues of facts are to be determined by the jury under appropriate instructions by the Court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 891 (1935).

In Virginia, Demurrer is the proper pleading for objecting to a Motion for Judgment which fails to state a cause of action for defects apparent on the face of the pleading. If all the facts alleged are proved as alleged and as such do not impose legal liability on Defendant, the Demurrer should be sustained. *Smith v. Wolseifer*, 119 Va. 247, 252, 89 S.E. 115 (1916). In such a case, the pleading has fatal defects on its face which presents a question of law, not of fact.

Petitioner contends that in a malicious prosecution action, the issue of probable cause is a question for the jury. However, there is no unqualified right to a trial by jury on the issue of probable cause. "Only where the facts relating to probable cause are not in dispute in a malicious prosecution action does the issue become a question of law for the Court; and when such facts are in dispute, the issue is one of fact to be resolved by the triers of fact." *Lee v. Southland Corp.*, 219 Va. 23, 27, 224 S.E.2d 756 (1978). In the present case, there are no facts relating to probable cause in dispute. Petitioner incorporated the transcript of the criminal proceeding in his Motion for Judgment for malicious prosecution. The only facts relating to probable cause are found within the transcript which speaks for itself. There is no dispute over the contents of the transcript. Upon review of

the pleading and the transcript incorporated therein, the lower Court held as a matter of law that probable cause existed. The Court was faced with an issue of law which was solely within its province to resolve.

CONCLUSION

The Court was well within its province to resolve the issue of law presented by the Demurrer. The issue of probable cause was not an issue of fact for the jury but an issue of law for the Court since no facts were in dispute. A review of the factual allegations contained in the pleading and the transcript of the criminal proceeding shows that probable cause did exist and that the Demurrer was properly sustained. Petitioner did not suffer a violation of a right to trial by jury since no such right existed on the issue of law. Wherefore, The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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